Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

FRED S. PANG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the District Court erred in refusing to allow evidence of Petitioner's pre-trial tax payment (which formed the basis of his defense) so that it could be brought before the jury and proved according to the procedures mandated by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Cheek v. United States*, 498 U.S. 192 (1991), and *Blakely v. Washington*, 124 S.Ct. 2531 (2004).

PARTIES TO PROCCEDING

The parties to the proceeding are:

FRED S. PANG, an individual;

UNITED STATES OF AMERICA

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit filed on March 30, 2004, is reproduced in the Appendix at A1. The judgment of the United States District Court of the Northern District of California filed on January 23, 2003, is reproduced in the Appendix at A13.

BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeals for the Ninth Circuit entered its judgment on March 30, 2004. Appendix A1. Petitioner, Fred S. Pang ("Pang") seeks review of that judgment on a writ of certiorari.

On April 13, 2004, Petitioner Pang timely filed a petition for rehearing en banc in the Ninth Circuit Court of Appeals. On May 13, 2004, the Court of Appeals filed an order denying both a petition for rehearing and the petition for rehearing en banc. Appendix A25. The present Petition is timely filed under 28 U.S.C. Section 2101(c) and under Rule 13.3 of this Court.

This Court has jurisdiction under 28 U.S.C. Section 1254(1) to review on a writ of certiorari the judgment of a federal court of appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions,

the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . . "

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Following a jury trial, Petitioner was convicted of five counts of violating Title 31, U.S.C. §§ 5313(a), 5322, and 5324(a)(3) pertaining to structuring, four counts of violating 26 U.S.C. § 7201, the tax evasion statute, for his tax years 1994, 1995, 1996, and 1997, and four counts of violating 26 U.S.C. § 7206(1), filing false tax returns, for those same years. The court entered judgment and sentenced Petitioner on January 15, 2003, to twenty-four months of incarceration, followed by a term of supervised release of three (3) years. (RTS 29:23-31:14; ER 1).[1]

On August 19, 1998, seven IRS agents entered Petitioner's business, Sin Ma Imports, to conduct an interview. Thereafter, on August 29, 1998, a search was conducted of Sin Ma Imports pursuant to warrant. Petitioner filed a motion to suppress evidence resulting from the above actions on February 20, 2002. (ER 3). The trial court granted an evidentiary hearing, which occurred on March

[1] Citations to the record are as follows: "EH" denotes the reporter's transcript of the Evidentiary Hearing on the motion to suppress; "ER" denotes the Excerpt of the Record; "RT" denotes the Reporter's Transcript of the jury trial.

20, 2002. On March 28, 2002, the trial court denied the motion. (ER 3).

On September 10, 2001, the Government filed an information charging Petitioner with five counts of violating Title 31 U.S.C. §§ 5313(a), 5322, and 5324(a)(3) (structuring), four counts of violating 26 U.S.C. § 7201 (tax evasion), for tax years 1994, 1995, 1996, and 1997, and four counts of violating 26 U.S.C. § 7206(1) (filing false tax returns). (ER 5). On October 5, 2001, Petitioner waived his right to prosecution by indictment and pleaded not guilty. (ER 4).

Jury trial began on August 12, 2002, and ended on August 20, 2002, when the jury returned a guilty verdict on all counts. (ER 4).

Pre-trial motions, in addition to the Motion to Suppress, filed by Petitioner are: Motion in Limine filed July 17, 2002; Motion to Suppress or Dismiss, Based on Government Abuse of the Grand Jury Process, filed August 7, 2002; and Petitioner's Memorandum in Support of $459,227.59 Tax Payment to be Allowed to be Introduced Into Evidence filed August 7, 2002. The Court's pre-trial order on August 1, 2002 denied Petitioner the right to introduce evidence of the $459,227.59 payment, or to refer to it in anyway.

The case against Petitioner consisted of invoices and checks that the prosecution contended represented income which was not reported on Petitioner's tax returns for the years 1994 through 1997 (tax evasion and filing false statement counts).

Petitioner's theory of defense rested upon the premise that his good faith misunderstanding of the tax law

negated the requisite willfulness for tax evasion and the filing of a false tax return. "Under the proper circumstances, however, a good faith misunderstanding of the law may negate willfulness." *United States v. Bressler*, 772 F.2d 287, 290 (7th Cir 1985), *cert. denied*, 474 U.S. 1082 (1986); *see United States v. Cheek*, 498 U.S. 192 (1991). The prosecution offered only circumstantial evidence about Petitioner's alleged willfulness.

This is a tax case. Tax cases are built upon documents which, it was argued below, were not properly authenticated nor was a proper foundation laid for the admission into evidence of same. Although not at issue in Petitioner's current Petition for Writ of Certiorari, these violations, along with others noted in the arguments below, including the jury having received what Petitioner believes to have been inadequate guidance – in that the term "admission" was introduced by the trial court, but never defined – highlight and exacerbate the fact that Petitioner's pre-trial tax payment, essential to his defense and proffered as evidence of his state of mind and misunderstanding of the complexities of the tax code, was deemed inadmissible. Further exacerbating the Trial Court's refusal to allow the jury to consider this fact, is the fact that the jury instructions given below regarding the elements of structuring fatally varied from the language of the information such that Petitioner's Sixth Amendment rights were violated. All of the above factual and procedural posture and settings of this matter served as a colloidal web of resonance in which the Court's refusal to admit into evidence Petitioner's pre-trial tax payment became so amplified as to amount to a *Blakely* violation, affecting the integrity of the jury process itself.

Petitioner's post-trial Motion for a New Trial, or in the Alternative, for Acquittal was filed on August 29, 2002. A hearing was held on September 18, 2002. The ruling denying the motion was appealed.

The Court of Appeals, holding jurisdiction under 28 U.S.C. Section 1291, filed its Opinion on March 30, 2004. Appendix A1. The clerk entered judgment on that date. Pang Petititioned the Court of Appeals for a Rehearing En Banc, and on May 13, 2004 the Court of Appeals filed an Order denying Rehearing and Rehearing En Banc. Appendix A25.

At trial, Petitioner sought introduction of his after-the-fact tax payment as evidence of his lack of subjective willfulness for tax evasion, in light of the United States Supreme Court decision in *United States v. Cheek*, 498 U.S. 192 (1991). On appeal, the same argument was raised by Petitioner and summarily dismissed by the panel which chose to rely on a 39-year-old United States Supreme Court decision, *Sansone v. United States*, 380 U.S. 343 (1965), and a 24-year-old Ninth Circuit Court of Appeals decision, *United States v. Ross*, 626 F.2d 77, 81 (9th Cir. 1980), which followed *Sansone*. The panel misapplied the law of *Sansone* to the facts of Petitioner's action, and failed to consider the applicable law of *Cheek*. The panel's decision to ignore *Cheek* creates a conflict with an existing decision of the United States Supreme Court, which created a basis for en banc consideration. Furthermore, the applicability of *Cheek* and *Blakely* for future tax payments raises issues of exceptional importance.

ARGUMENT

A. The Court of Appeals Decision Fails to follow an Opinion of the Supreme Court and Conflicts with an Opinion of Another Circuit Court

Prior to the commencement of trial in this matter Petitioner demonstrated his objective good faith belief in his understanding (or misunderstanding) of the complexities of the tax code in the preparation of the data used in his tax returns. Petitioner underwent a civil audit for tax year 1994. (RT 434:15-16). The IRS determined that a nominal amount was owed. Petitioner exhibited his customary compliance with IRS requests by promptly paying the balance due.

When it appeared to Petitioner that the dispute in the present matter was unlikely to be resolved before trial, he paid the IRS $459,227.59, which represented the amount owed as computed by the IRS. This evidence was relevant to and supported Petitioner's habit and custom of being currently in compliance with the IRS; being probative also in relation to Petitioner's state of mind in complying with the IRS's execution of the tax law to correct his objective, good faith misunderstanding of the law. The jury could conclude that the practice of affirmatively responding to the IRS in a timely manner suggests that Petitioner is compliant with the tax laws. The trial court prevented Petitioner from arguing that the $459,227.59 payment demonstrated a lack of desire to "evade or defeat" additional tax. The totality of Petitioner's good faith misunderstanding, compliant habit and custom, and acquiescent state of mind negate willfulness. The timing of the payment should have been an issue for the jury to consider in evaluating the veracity of Petitioner's defense.

The Court of Appeals blindly followed the reasoning of the District Court, coming to the conclusion that the latter had correctly excluded evidence of the pre-trial tax payment by Petitioner, upon the grounds that such evidence was "irrelevant." *Sansone v. United States*, 380 U.S. 343, 354, 85 S.Ct. 1004 (1965) (subsequent intention to pay taxes is no defense to a past intention to evade taxes); *United States v. Ross*, 626 F.2d 77, 81 (9th Cir. 1980) (same). The Appeals Court compounded its myopic view by espousing the time-worn party line "[w]ere the rule otherwise, tax evaders could avoid criminal prosecution simply by paying up after being caught." Nothing could be further from the truth, which is, that allowing evidence of this nature to be placed before the jury brings the entire litigation, both instant, and universal, into line with this Court's recent pronouncement in *Blakely v. Washington*, 124 S.Ct. 2531, 2538, that its commitment to *Apprendi* and cases of like nature, "reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial [a right that is] no mere procedural formality, but a fundamental reservation of power in our constitutional structure."

Both lower Courts failed to address the United States Supreme Court decision in *United States v. Cheek*, 498 U.S. 192 (1991) (subjective, good faith misunderstanding of the tax law, or a good faith belief that one is not violating the law, negates requisite willfulness for tax evasion). Petitioner's tax payment showed his habit and custom to be in compliance with IRS regarding tax matters. His behavior in paying the taxes demonstrated a lack of desire to evade or defeat additional tax, which is an element for the crime of tax evasion.

Willfulness may be established in prosecutions for tax evasion by "any conduct, the likely effect of which would be to mislead or conceal." *Spies v. United States*, 317 U.S. 492, 499 (1943). The failure to file a tax return or to pay a tax, is insufficient for a conviction of tax evasion pursuant to 26 U.S.C. § 7201. An affirmative act needs to be shown constituting evasion or attempted evasion. *Sansone v. United States*, 380 U.S. 343, 351 (1965). The crime of tax evasion may be triggered by conduct of the taxpayer after a return has been filed. *See United States v. Carlson*, 235 F.3d 466, 470-471 (9th Cir. 2000). While the filing of a tax return may be the culminating act for the crime of tax evasion or the filing of a false tax return, additional evidence needs to be considered by the trier of fact in assessing whether Petitioner's conduct is willful, or due to mistake, inadvertence, or negligence.

As the Ninth Circuit has observed: "Independent evidence of 'willfulness' may be established by 'the so-called badges of fraud' and acts both prior and subsequent to the indictment period may be probative of the defendant's state of mind." *United States v. Voorhies*, 658 F.2d 710, 715 (9th Cir. 1981), referencing *United States v. Jannuzzio*, 184 F.Supp. 460, 470 (D.Del. 1960). As there is no restriction on evidence of wrongdoing which occurs after the charged period, there likewise should be no restriction on evidence of an innocent state of mind which occurs after-the-fact of filing a return. As this Court has stated: "The question of willfulness is uniquely suited for determination by the trier of fact." *Voorhies, supra*, at 715, referencing *United States v. House*, 524 F.2d 1035, 1045 (3rd Cir. 1975). A jury will only be able to reach a satisfactory determination if it is allowed to consider all probative evidence. The District Court's refusal to admit into evidence

Petitioner's pre-trial tax payment prevented the jury from determining whether or not any tax deficiency existed, an essential element in proving tax evasion under 26 U.S.C. § 7201. The jury could have also considered the payment as evidence of an admission by Petitioner that he evaded his taxes.

Petitioner's after-the-fact tax payment was probative on the issue of his lack of subjective willfulness for tax evasion. *See United States v. Cheek*, 498 U.S. 192 (1991). The Ninth Circuit Court of Appeals summarily dismissed *Cheek*, choosing instead to rely on a 39-year-old United States Supreme Court decision, *Sansone v. United States*, 380 U.S. 343 (1965), and a 24-year-old Ninth Circuit Court of Appeals decision, *United States v. Ross*, 626 F.2d 77, 81 (9th Cir. 1980), which followed *Sansone*. The Panel's decision to ignore *Cheek* creates a conflict with an existing decision of the United States Supreme Court.

To establish a violation of 26 U.S.C. Section 7201 (tax evasion), the following elements must be proved: An affirmative action to evidence an attempt to evade or defeat a tax or the payment thereof; An additional tax due and owing; and Willfulness. *See Spies v. United States*, 317 U.S. 492, 496-499 (1931).

The affirmative action to evidence an attempt to evade or defeat a tax may be "any conduct, the likely effect of which would be to mislead or to conceal" for tax evasion purposes. *Spies*, at 499. It makes no difference whether the false statements are made before, simultaneously with, or after the taxpayer's failure to file a return. *United States v. Copeland*, 786 F.2d 768, 770 (7th Cir. 1985). *See also United States v. Mal*, 942 F.2d 682, 684 (9th Cir. 1991); *United States v. Winfield*, 960 F.2d 970, 973 (11th

Cir. 1992). The conduct of the taxpayer must be considered in light of the entire facts and circumstances of the case.

As *Sansone* correctly stated: "No defense to a Section 7201 evasion charge is made out of showing that the defendant willfully and fraudulently understand his tax liability for the year involved but intended to report the income and pay the tax at some later time." *Sansone*, at 354. Unlike *Sansone,* wherein the willful filing of the false tax return was established by admission, Mr. Pang asserted that the returns were not willfully and knowingly filed as false documents. Mr. Sansone's acknowledgement of his false conduct led the Supreme Court to rightfully conclude that "there is no dispute that the petitioner's material misstatement resulted in a tax deficiency." *Sansone*, at 353.

The panel's assessment that "tax evaders could avoid criminal prosecution simply by paying up after being caught," totally mischaracterizes and minimizes the implication of the Supreme Court decision in *United States v. Cheek*, 498 U.S. 192 (1991).

As the *Cheek* Court noted, a subjective, good faith misunderstanding of the tax law, or a good faith belief that one is not violating the law, negates the requisite willfulness for tax evasion. The proliferation of tax regulations have made them notoriously complicated. Law-abiding taxpayers often are at a loss for how to comply with the laws and regulations. The Court wants to prevent unwarranted convictions in criminal tax cases. Secondly, all taxpayers are entitled to the full protection of a jury trial. When intent is an element of an offense, its existence is a question of fact that cannot be taken from the jury because the belief of the taxpayer is incredible or irrational:

"forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision." *Cheek*, 498 U.S. at 203-204. *See also Commonwealth v. Kingston*, 706 N.E.2d 1153 (1999). This rule is also in full accord with this Court's recent decision and concern for the full implementation of the integrity and viability of the American Jury system. *Blakely v. Washington*, 124 S.Ct. 2531.

The question before the Ninth Circuit Panel was not the veracity of Mr. Pang's subjective claim. Such is not the province of the District Court, the panel, or any judicial reviewing body. The Supreme Court has made this abundantly clear. The question of willfulness belongs solely to the jury. Even in *Sansone*, the jury heard evidence that defendant intended to make full payment of his taxes in the future. *Sansone*, at 344-345. It is not up to the courts to limit the type of evidence which is presented because the beliefs may be incredible or that they may be disregarded by the jury. *Cheek*, at 203-204. Here, the District Court interceded, and the Ninth Circuit Panel refused to recognize *Cheek*. The result is that Petitioner was denied a fundamental right to jury consideration of the element of "willfulness."

B. The Proceeding Involves a Question of Exceptional Importance, in that the Result, if Undisturbed, Will Defeat this Court's Recent Commitment to Giving Intelligible Content to the Fundamental Constitutional Right of Trial by Jury

As noted herein, tax cases are not only complicated, often involving disputes even among the experts as to the meaning of these statutes, let alone reflecting upon the

difficulties encountered by one in Petitioner's situation, but an ever increasing segment of the American population finds itself facing the rigors or threats of criminal prosecutions of the nature herein.

As this Court recently stated in its *Blakely* holding:

> "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. *See* Letter XV by the Federal Farmer (Jan 18, 1788), reprinted in 2 The Complete Anti-Federalist 31,320 (H. Storing ed.1981) (describing the jury as "secur[ing] to the people at large, their just and rightful control in the judicial department"); John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 Works of John Adams 252, 253 (C.Adams ed. 1850) ("[T]he common people, should have as complete a control . . . in every judgment of a court of judicature" as in a legislature); Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), reprinted in 15 pages of Papers of Thomas Jefferson 282,283 (J. Boyd ed. 1958) ("Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative"); *Jones v. United States*, 526 U.S. 227, 244-248, 119 S.Ct. 1215, 143 L. Ed.2d 311 (1999). *Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended."

Blakely v. Washington, 124 S.Ct. 2531, 2538-39. The *Blakely* Court's emphasis upon this fundamental right is accentuated by the fact that the subject of taxes themselves are in the

newspapers and on the minds of nearly all Americans on a daily basis.

C. This Case Is an Excellent Vehicle for Considering the Question Presented

Three aspects of this case render it an excellent vehicle for resolving the split of authority mentioned above.

A defendant's attitude toward the IRS is indicative of willfulness. *See, e.g., United States v. Hogan*, 861 F.2d 312, 316 (1st Cir. 1988) (Court's instruction allowing jury to consider attitude toward IRS as indication of willfulness not error). While this is often thought of in the negative when encountering tax protesters, the theory remains the same for those who want to comply with the IRS. Mr. Pang never had a problem with the IRS in the past; and the evidence he was attempting to introduce, his pre-trial tax payment, was clearly reflective of his habit and custom of willingness to comply with the tax laws. As this Court has observed, "uncertainty often arises even among taxpayers who earnestly wish to follow the law." *United States v. Bishop*, 412 U.S. 346, 360 (1973).

CONCLUSION

Petitioner's rights were denied throughout the investigation and trial. Petitioner's right to have the grand jury assess the evidence against him was usurped by the prosecution. The jury was not allowed to consider evidence of Petitioner's good faith misunderstanding of the complex tax code. Payment evidence reflecting Petitioner's compliant habit and custom with the IRS was excluded.

Petitioner was denied a fair trial and his Sixth Amendment and Fourteenth Amendment rights were violated.

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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362 F.3d 1187

United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Fred S. PANG, Defendant-Appellant.

No. 03-10032.

Argued and Submitted Feb. 5, 2004.

Filed March 30, 2004.

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Thomas Moore, Assistant United States Attorney, San Francisco, CA, for the plaintiff-appellee.

Appeal from the United States District Court for the Northern District of California; Phyllis J. Hamilton, District Judge, Presiding, D.C. No. CR-01-00337-PJH.

Before: TASHIMA, THOMAS, and SILVERMAN, Circuit Judges.

SILVERMAN, Circuit Judge:

Defendant Fred S. Pang was charged in an information, and found guilty by a jury, of five counts of unlawful structuring of currency transactions, four counts of income tax evasion, and four counts of filing false tax returns. He was sentenced to twenty-four months imprisonment, and raises several arguments on appeal.

I. THE VOLUNTARINESS OF PANG'S CONSENT TO ENTER HIS PREMISES AND OF THE STATEMENTS HE MADE TO THE IRS AGENTS

A. FACTS

Pang owned and operated Sin Ma Imports, a wholesale company that sells cooking oils to restaurants and retailers. At around 9:00 A.M. on August 19, 1998, IRS Special Agent Kevin Caramucci and six other agents went to the offices of Sin Ma Imports, presented themselves at a locked iron security gate at the entrance, rang the bell, showed badges, and identified themselves. All of the agents wore business attire and carried concealed weapons. Pang unlocked the gate and allowed the agents to enter. Pang's wife Nancy escorted two agents to her office where they interviewed her. Two other agents interviewed Sin Ma employees.

Three agents stayed with Pang and interviewed him in an outer office. According to the agents, prior to commencing the interview, Caramucci read Pang the so-called "IRS Non-Custodial Statement of Rights Card."[1] Pang

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[1] The card states:

> [A]s a special agent, one of my functions is to investigate the possibility of criminal violations of the Internal Revenue laws and related offenses.
>
> In connection with my investigation of your tax liability or other matters, I would like to ask you some questions. However, first, I advise you that under the Fifth Amendment to the Constitution of the United States, I cannot compel you to answer any questions or to submit any information if such answers or information might tend to incriminate you in any way.
>
> I also advise you that anything which you say, and documents that you submit may be used against you in any criminal proceedings which may be undertaken.

(Continued on following page)

responded that he understood his rights and voluntarily agreed to answer questions. Pang was asked about his businesses practices and records. He responded to questions with explanations and examples and left his chair to get records to substantiate his responses. The agents remained seated until the interview was completed, about an hour later. At the conclusion of the interview, the agents gave Pang a list of documents they needed, and then left.

At the hearing on Pang's motion to suppress the statements he made to the agents, Pang testified that he was never read his rights and that he was coerced into talking to the agents or induced into doing so by the agents' deceit and misrepresentations. He also claimed that he was particularly vulnerable to intimidation, having been raised in Singapore where "brutal consequences befall those who do not accede to government actions," even though he and his wife have lived in the United States for nearly 40 years and are U.S. citizens.

The district court denied the motion to suppress. The court specifically found Pang not to be credible. The court also found that Caramucci read Pang the IRS warnings and that Pang's statements and his consent to the IRS agents to enter his premises were voluntary and not the product of coercion, fraud, or misrepresentation. The court also found "suspect" Pang's claim that he feared the agents. In any event, the court found that the agents did nothing improper.

I advise you further that you may, if you wish, seek the assistance of an attorney before responding.

Do you understand these rights?

B. STANDARD OF REVIEW AND ANALYSIS

"We review de novo the district court's denial of a suppression motion. The district court's underlying factual finding that a person voluntarily consented to a search is reviewed for clear error." *United States v. Patayan Soriano*, No. 01-50461, 361 F.3d 494, 501, 2004 WL 439854, at *5 (9th Cir. Mar.11, 2004) (citations omitted); *see also United States v. Rosi*, 27 F.3d 409, 411 (9th Cir.1994) (addressing warrantless entry). The government bears the burden of proving that consent was freely and voluntarily given. *Patayan Soriano*, 361 F.3d 494, 2004 WL 439854, at *6. On appeal, we view evidence regarding the question of consent in the light most favorable to the fact-finder's decision. *Id.*

Having examined the record, we hold that the district court did not clearly err in finding Pang not credible. Likewise, the court did not clearly err in finding Pang voluntarily consented to the entry of his premises and voluntarily made the statements to the agents. *See United States v. Huynh*, 60 F.3d 1386, 1388 (9th Cir.1995).

II. THE ADMISSIBILITY OF THE SIN MA INVOICES AND THE WO LEE CANCELLED CHECKS

The gist of the government's tax case was that Pang failed to fully report income derived from sales to six of Sin Ma Import's customers. Representatives of five of the customers testified at trial concerning how they conducted business with Sin Ma. However, the government was unable to procure the testimony of a representative of the sixth customer, Wo Lee Co. Consequently, the government sought to introduce into evidence documents obtained

from Wo Lee without calling anyone from Wo Lee to authenticate them.

These documents consisted of original invoices issued by Sin Ma and corresponding original cancelled checks written on Wo Lee's bank account. Agent Caramucci testified that Wo Lee's owner, Ming Tzeu Chen, gave these documents to IRS Agent Charlie Busch, who in turn gave them to Caramucci. Pang objected to these invoices and checks on hearsay and foundation grounds. The district court found, and Pang does not dispute, that the invoices are identical to numerous other invoices that were already admitted into evidence. Many of the invoices matched up to carbonless copies of the same invoices contained in Pang's own records seized pursuant to a search warrant. Other invoices not matched with carbonless copies bore invoice numbers appearing in sequence with other invoices contained in Sin Ma's invoice book. The district court admitted these documents into evidence, but instructed the jury that it was the final arbiter of whether the documents were authentic.

A. STANDARD OF REVIEW

We review for abuse of discretion a district court's finding that evidence is supported by a proper foundation. *United States v. Tank*, 200 F.3d 627, 630 (9th Cir.2000). We may affirm an evidentiary ruling on any ground supported by the record, regardless of whether the district court relied on the same grounds or reasoning we adopt. *Atel Financial Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir.2003) (per curiam). Even if we find error, we will only reverse if an erroneous evidentiary ruling "more likely

than not affected the verdict." *United States v. Angwin*, 271 F.3d 786, 798 (9th Cir.2001).

B. ANALYSIS

1. The Cancelled Checks

The Wo Lee checks did not require extrinsic evidence of authenticity. As a negotiable instrument, a check is a species of commercial paper, and therefore self-authenticating. *See* Fed.R.Evid. 902(9);[2] *United States v. Hawkins*, 905 F.2d 1489, 1494 (11th Cir.1990) (checks); *United States v. Little*, 567 F.2d 346, 349 n. 1 (8th Cir.1977) (same); *see also United States v. Carriger*, 592 F.2d 312, 316 (6th Cir.1979) (promissory notes).

Pang also argues that the Wo Lee checks were hearsay. Hearsay is "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed R. Evid. 801(c). However, out-of-court statements that are offered as evidence of legally operative verbal conduct are not hearsay. They are considered "verbal acts." *Stuart v. UNUM Life Ins. Co. of America*, 217 F.3d 1145, 1154 (9th Cir.2000) (insurance policy); *United States v. Arteaga*, 117 F.3d 388, 395-98 (9th Cir.1997) (money wire transfer

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[2] Fed.R.Evid. 902(9) provides:

Rule 902. Self Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

. . . .

(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents related thereto to the extent provided by general commercial law.

forms). Checks fall squarely in this category of legally-operative verbal acts that are not barred by the hearsay rule. See, *e.g.*, *Spurlock v. Comm'r of Internal Revenue*, 85 T.C.M. (CCH) 1236, 1240 (T.C.2003) ("A check is a negotiable instrument, a legally operative document, and falls within the category of 'verbal acts' which are excludable from the hearsay rule."); *United States v. Dababneh*, 28 M.J. 929, 935 (N.M.C.M.R.1989) ("[C]hecks themselves, together with the tellers' markings and routing stamps, . . . are commercial events which create legal rights and obligations, and therefore no exception to hearsay need be found [to admit checks into evidence]".). Because the Wo Lee checks were self-authenticating and are not hearsay, the district court properly admitted them.

2. The Invoices

Unlike checks, invoices are not self-authenticating under Rule 902(9). An invoice is an "itemized list of goods or services furnished by a seller to a buyer, usu[ally] specifying the price and terms of sale." Black's Law Dictionary 833 (7th ed.1999). It is not commercial paper, nor is it a document "relating thereto to the extent provided by general commercial law." Fed.R.Evid. 902(9). To the contrary, "general commercial law" – whatever that is (presumably the Uniform Commercial Code) – makes no provision for invoices. Therefore, the government, as the proponent of the invoices, was obliged to come forward with evidence sufficient to support a finding that the invoices were what they purported to be. This it did. The government showed, and Pang does not dispute, that the invoices were identical to other invoices that were received into evidence, that they were matched to carbonless copies of the same invoices in evidence, and that the numbers were in sequence with the

numbers of other invoices that were in evidence. Furthermore, the invoices correlated dollar-for-dollar with the cancelled checks.

The authentication requirement is satisfied by "evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed.R.Evid. 901(a). The proponent need not establish a proper foundation through personal knowledge; a proper foundation "can rest on any manner permitted by Federal Rule of Evidence 901(b) or 902." *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 774 (9th Cir.2002). Rule 901 allows the district court to admit evidence "if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification." *Tank*, 200 F.3d at 630. We agree with the district court that the government offered sufficient circumstantial proof that the invoices were what they purported to be. Therefore, the foundation was adequate.

The next question is whether the invoices were hearsay. They were not. When offered against Pang, Pang's invoices were admissions, and therefore non-hearsay as defined by Rule 801(d)(2).

III. CONSTRUCTIVE AMENDMENT OF THE INFORMATION

With respect to the structuring counts, Pang argues that the information was constructively amended. We review de novo allegations that there was constructive amendment of an indictment, *United States v. Adamson*, 291 F.3d 606, 612 (9th Cir.2002), and we apply that same standard to an information. The information charged that Pang acted "knowingly and for the purpose of evading the reporting requirements." However, when it came time to

settle instructions, the court ruled that "knowingly" is not an element of the offense and that its inclusion in the information was surplusage. Consequently, the district court instructed the jury as follows: "To sustain a charge of unlawfully structuring a financial transaction . . . the government must prove the following: First, that defendant structured or attempted to structure a transaction for the purpose of evading the currency transaction reporting requirements. And, second, that the transaction involved one or more domestic financial institutions."

31 U.S.C. § 5324(a)(3) provides: "No person shall, for the purpose of evading the reporting requirements of section 5313(a) [which requires banks to file currency transaction reports for any cash transaction exceeding $10,000] . . . structure or assist in structuring . . . any transaction. . . ." In 1994, the Supreme Court held that conviction for structuring required proof that the "defendant acted with knowledge that his conduct was unlawful." *Ratzlaf v. United States*, 510 U.S. 135, 137, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994). In response to *Ratzlaf*, Congress excepted violations of § 5324 from the penalty provisions of § 5322, which require willfulness, and added a penalty provision to § 5324 that did not require knowledge that structuring was illegal. Money Laundering Suppression Act of 1994, Pub.L. No. 103-325, § 411(a) and (c)(1), 108 Stat. 2160, codified at 31 U.S.C. §§ 5322(a), (b) and 5324(d). This eliminated the willfulness requirement imposed by *Ratzlaf*. *United States v. Ahmad*, 213 F.3d 805, 809 (4th Cir.2000); *see also United States v. Lindberg*, 220 F.3d 1120, 1122 n. 2 (9th Cir.2000) ("*Ratzlaf* has been superseded by statute"). After the amendments, the prosecution needs to prove "that there was an intent to evade the reporting requirement," but does not need to

also prove "that the defendant knew that structuring was illegal." H.R. Rep. 103-438, at 22 (1994).[3]

A constructive amendment occurs when the defendant is charged with one crime but, in effect, is tried for another crime. *Adamson*, 291 F.3d at 614. That is not what occurred here. The jury was properly instructed on the elements of unlawful structuring of financial transactions. The district court did not err by refusing to instruct the jury to find an element that really isn't an element. The failure to include in the instructions surplusage from the information was not error because only the "essential elements" of the charge need be proven at trial. *United States v. Jenkins*, 785 F.2d 1387, 1392 (9th Cir.1986). In any event, Pang failed to show that he was ambushed or misled in any way by the extraneous language in the information.

IV. BELATED TAX PAYMENTS

Pang argues that the district court erred in preventing him from offering evidence that, while awaiting trial in this criminal matter, he paid the IRS $459,227.59, the amount due for the tax years in question. Pang proffered this evidence to demonstrate a lack of intent to wilfully "evade or defeat" the tax laws. We review for abuse of discretion the district court's decision to exclude evidence. *United States v. Alvarez-Farfan*, 338 F.3d 1043, 1045 (9th Cir.2003).

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[3] Pang was charged with unlawful structuring occurring in 1996, so the 1994 amendments apply.

The district court correctly ruled that evidence of belated tax payments, made while awaiting prosecution, is irrelevant. *Sansone v. United States*, 380 U.S. 343, 354, 85 S.Ct. 1004, 13 L.Ed.2d 882 (1965) (subsequent intention to pay taxes is no defense to a past intention to evade taxes); *United States v. Ross*, 626 F.2d 77, 81 (9th Cir.1980) (same). Were the rule otherwise, tax evaders could avoid criminal prosecution simply by paying up after being caught.

V. GRAND JURY SUBPOENA

Finally, Pang argues that the IRS abused the grand jury process by serving a grand jury subpoena on Pang's accountant when he declined to produce Pang's tax work papers. We review de novo alleged abuse of the grand jury process. *United States v. Fuchs*, 218 F.3d 957, 964 (9th Cir.2000).

On the day that Pang was visited by the IRS agents, two of the agents also called upon Pang's accountant, William Wan. Wan told the agents that he was in possession of work papers used to prepare Pang's tax returns. Wan left the room ostensibly to get the papers, but returned a few minutes later to tell the agents Pang's attorney had advised him not to voluntarily produce information without being served with a grand jury subpoena. The agents then served Wan with a grand jury subpoena. Later that day, Wan called one of the agents and agreed to voluntarily produce the subpoenaed records prior to the grand jury return date.

As we understand it, Pang's argument appears to be that the IRS agents misused the subpoena process to obtain information from Wan that they otherwise would

not have gotten. We see no impropriety here. Nothing prohibits a subpoenaed grand jury witness from voluntarily consenting to an interview. *United States v. Duncan*, 570 F.2d 292, 293 (9th Cir.1978) (per curiam).

AFFIRMED.

United States District Court
Northern District of California

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	(For Offenses Committed On or After November 1, 1987)
FRED S. PANG	Case Number: CR-01-0337 PJH
	Martin Schainbaum & Joan Rodman Defendant's Attorney
	(Filed Jan. 23, 2003)

THE DEFENDANT:

[ ] pleaded guilty to count(s): _____.

[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

[x] was found guilty on count(s) one through thirteen of the Information after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
31 U.S.C. 5322(a) & 5324(a)(3)	Unlawful Structuring of Currency		1-5
26 USC 7201	Income Tax Evasion		6-9
26 USC 7206(1)	False Tax Returns		10-13

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____.

[ ] Count(s) ____ (is) (are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.:
558-78-1822

Defendant's Date of Birth:
12/25/43

Defendant's USM No.:
75615-011

Defendant's Residence Address:
1345 Lakeview Drive
Hillsborough, CA 94010

Defendant's Mailing Address:
1345 Lakeview Drive
Hillsborough, CA 94010

January 15, 2003
Date of Imposition of Judgment

/s/ [Illegible]
Signature of Judicial Officer

Honorable Phyllis J. Hamilton, U. S. District Judge
Name and Title of Judicial Officer

[Illegible]
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 24 months.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[X] The defendant shall surrender to the United States marshal for this district.
[X] before 2:00 P.M. on January 15, 2004.
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before ___ on ____.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By_____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term 3 years.

While on Supervised Release you shall not commit another federal, state or local crime and shall not illegally possess a controlled substance. Revocation of supervised release is mandatory for possession of a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

[x] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

[ ] The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

Revocation of supervised release in [sic] mandatory for refusal to comply with drug testing imposed as a condition of supervision. 18 U.S.C. Sections 3565(b)(3) and 3583(g)(3).

You shall pay the assessment imposed in accordance with 18 U.S.C. Section 3013, and shall immediately notify the probation officer of any change in your economic circumstances that might affect your ability to pay a special assessment, fine, restitution, or co-payments ordered by the Court.

If the judgment imposes a fine or a restitution obligation, it shall be a condition of supervision that you pay any

such fine or restitution that remains unpaid at the commencement of the term of supervision in accordance with any Schedule of Payments set forth in the Criminal Monetary Penalties sheet of the judgment. In any case, the defendant shall cooperate with the probation officer in meeting any financial obligations.

STANDARD CONDITIONS OF SUPERVISION

It is the order of the court that the defendant shall comply with the following standard conditions:

1) The defendant shall not leave the judicial district or other specified geographical area without permission of the court or the probation officer;

2) The defendant shall report to the probation officer as directed by the Court or the probation officer, and shall submit a truthful and complete written report within the first five days of each month;

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) The defendant shall support his or her dependents and meet other family responsibilities, including but not limited to, compliance with the terms of any court order or administrative process pursuant to the laws of a state, the District of Columbia, or any other possession or territory of the United States, requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living;

5) The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;

7) The defendant shall consume no alcohol if sentenced to the special condition that the defendant are [sic] to participate in a drug/alcohol program;

8) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substance, except as prescribed by a physician;

9) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) The defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere, and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

13) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;

14) The defendant shall notify third parties of risks related to the defendant's criminal record, personal history, or characteristics, and shall permit the probation officer to make such notifications and/or confirm the defendant compliance with this notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1 The defendant shall provide the probation officer access to any requested financial information.

2 The defendant shall comply and cooperate with the IRS in good-faith effort to pay any outstanding tax liability, to include any assessed penalty and interest. Defendant does not waive any rights he might have to challenge that assessment.

3 The defendant shall provide the U.S. Probation Office with a copy of any written and approved agreement with the IRS for the payment of any outstanding tax liability, to include penalty and interest, within 10 days from the execution of such agreement.

4 The defendant shall pay a $5,000 fine.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments directly following the Monetary Penalties section.

	Assessment	Fine	Restitution
Totals	$ 1,300 ($100 per count)	$	$

[ ] The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO245C) will be entered after such determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$ ___	$ ___	

[ ] If applicable, restitution amount ordered pursuant to plea agreement $ ____

[ ] The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

[ ] the interest requirement is waived for the [ ] fine and/or [ ] restitution.
[ ] the interest requirement for the [ ] fine and/or [ ] restitution is modified as follows:

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A [ ] Lump sum payment of $ due immediately, balance due

[ ] not later than _____, or

[ ] in accordance with ( ) C, ( ) D or, ( ) E below; or

B [ ] Payment to begin immediately (may be combined with ( ) C, ( ) D or, ( ) E below); or

C [ ] Payment in __ (e.g., equal, weekly, monthly, quarterly) installments of $ __ over a period of __ (e.g., months or year(s)), to commence __ (e.g., 30 or 60 days) after the date of this judgment; or

D [ ] Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of (e.g., months or year(s)), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E [ ] Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Case Number (including Defendant Number)	Defendant Name	Joint and Several Amount

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CRIMINAL MINUTES

JUDGE: Phyllis J. Hamilton

Date: January 15, 2003

Case No: CR-01-0337 P.H.

Case Name: UNITED STATES v. FRED S. PANG
(present)

Attorney for Plaintiff: Thomas Moore, AUSA
Attorney for Defendant: Martin Schainbaum &
Joan Rodman (ret)

Deputy Clerk: Lurline Moriyama

Court Reporter: Debra Pas

PROCEEDINGS

Defendant's Motion for a New Trial – DENIED as stated on the Record.

SENTENCING: 24 months, concurrent on all three counts; 3 years of Supervised Release:

(1) Standard Conditions of Release were imposed;

(2) Defendant shall cooperate with the IRS in a good faith effort to pay any outstanding tax liability, including any assessed penalty and interest. Defendant does not waive any rights he might have to challenge that assessment,

(3) Defendant shall provide to the probation officer, a copy of any written and approved agreement with the IRS for the payment of any outstanding tax liability, to include penalty and interest, within 10 days of the execution of such agreement,

(4) Defendant shall provide the probation officer access to any requested financial information,

(5) Defendant shall pay a $5,000 fine.

Defendant shall pay to the United States a $1,300 special assessment ($100 = each count) which is due immediately. A Payment of Special Assessment on Day of Sentencing Form was completed for $1,300; and given to Ms. Roadman to be brought immediately to the Clerk's Office. Defendant's Oral Request for Court Recommendation for Placement at Nellis Air Force Base – DENIED for the reasons stated on the Record. The requirement for urinalysis will be waived.

Defendant's Oral Motion for Bail Pending Appeal – GRANTED as stated on the Record. Defendant is referred to the Duty Magistrate Judge for the Entry of Conditions of Release, within the week. (**Probation Officer**: Lynne Richards – S Mateo)

cc: JCS, Financial Section

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. FRED S. PANG, Defendant-Appellant.	No. 03-10032 D.C. No. CR-01-00337-PJH Northern District of California, San Francisco ORDER (Filed May 13, 2004)

Before: TASHIMA, THOMAS, and SILVERMAN, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.